State Bar Of New Mexico

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District Court Orientation

An orientation has been planned to familiarize new lawyers with the Second Judicial District Court on JANUARY 10, 1986, from 1:30 p.m. - 5:00 p.m.

The program includes a film, helpful pamphlets, and presentations by Judges, lawyers and court staff.

The orientation will be held at the Second Judicial District Court, Jury Assembly Room, Room 314, Bernalillo County Courthouse, 415 Tijeras, NW, Albuquerque, NM. □

Sponsors Needed For Mock Trial

Each year the Bar's Law-Related Education Project runs a mock-trial competition for high school teams from throughout New Mexico. This competition not only is a valuable training tool for teachers, but involves attorneys and judges in furthering community education. The competition is done in two regional trials during February and March and one final state-wide meeting during April. Our state winners go on to a national mock-trial competition, this year in Phoenix, Arizona.

Although the LRE project provides administrative support, the costs for housing, food, awards banquet, and incidentals are not provided for in the budget. Last year, several law firms from throughout New Mexico provided sponsorship for local teams. This year, LRE hopes to increase Bar participation by arranging sponsors for up to 30 teams. This is a great method of directly affecting the community's awareness of the legal system and providing an opportunity for positive youth involvement.

The cost of bringing one team to Albuquerque for the finals is $250.00. Sponsorship of either your local high school team through LRE, or general sponsorship of the competition is needed. Parital or multiple team support is encouraged. All firms participating will be recognized at the awards banquet April 11 and through mailings. Any firms or individual attorneys interested please contact Don Westervelt or Kate Weinrod at the LRE office, 842-6269 or WATS (1-800-432-6976) for further information. □

SLF Announces Institute

The Southwestern Legal Foundation announces the 37th Annual Institute on Oil and Gas Law & Taxation, February 26-28, 1986. All sessions will be held at The Westin Hotel, Galleria Dallas, Dallas, Texas. Co-Chairmen of the law portion of the institute, February 26-27, will be W.H. Drushel, Jr., Vinson & Elkins, Houston, and James R. Coffee, Atlantic Richfield Company, Dallas. Chairman of the tax portion, February 28, will be Henry D. DeBerry III, Johnson & Swanson, Dallas. For a copy of the descriptive brochure, please contact Mrs. Cindie J. Burkel, Information Officer, The Southwestern Legal Foundation, P. O. Box 830707, Richardson, Texas 75083, or phone 214-690-2377, or telex 284522 SWLF UR. □

Disciplinary Note

An attorney was called from out-of-state by the father of a young man arrested and jailed in connection with a narcotics case in a small New Mexico town. After travelling to the town and visiting with his client in jail, the attorney met with the assistant district attorney (ADA) assigned to the case. At this meeting, the ADA proposed an arrangement whereby the client could plead guilty to a lesser felony but that sentencing would be left to

(continued on page 4)

Bulletin Jan 2, 1986 Vol 25, No 1

Seminar

(continued from page 1)

section will deal with the defense strategy, including motion practice and methods to minimize recovery or the impact of plaintiff's case.

On the second day, new actions being brought under Section 1983 will be discussed. It is felt that many cases which could be raised under Section 1983 and under municipal anti-trust liability are not being litigated because attorneys are not familiar with these means of recovery. Generally recoverable damages under Section 1983 will also be examined. In addition to a primer on damages which may be recoverable under ordinary 1983 cases, general rules as to how the court determines what damages are recoverable, and the changing law on what damages may be recovered with specific attention on recovery for loss of love and society in a 1983 wrongful death action will be addressed.

The Supreme Court's recent acceptance of Evans v. Jeff D., 743 F.2d 645, has focused all counsel on the problems associated with offers of judgment, settlements and attorney's fees. John Cary Sims of the Litigation Research Group, Washington, D.C. , who represented counsel in a Section 1983 attorney's case, will discuss the practical and ethical problems encountered in offering and accepting settlements and offers of judgment in cases involving possibility of Section 1983 attorney's fees.

The recent litigation involving attorney's fees reflected in Evans v. Jeff D. and Prandini v. Nat'l Tea Co., 557 F.2d 1013 (3rd Cir. 1977) have given rise to re-evaluation of the appropriate retainer agreement for cases involving the possibility of Section 1988 fees. Robert R. Rothstein, Esq., Rothstein, Bailey, Bennett, Daly and Donatelli, Santa Fe, will discuss factors to be considered in retainer agreements, as well as problems and solutions for associated tort claims.

While a number of attorneys are familiar with litigating against the government, few have been utilizing the Equal Access to Justice Act (28 U.S.C. §2412) in all cases in which it is applicable. Steven LeCuyer, Esq., of the DNA, Shiprock, will discuss the Act, the 1985 amendments to the Act, and alert attorneys to the variety of situations in which attorney's fees are recoverable against the United States under the Act. The discussion will include not only recovery for cases in which the government's position was not substantially justified, but also governmental liability for "bad faith."

Other featured speakers are Richard G. Carlisle, Esq., continuing legal education coordinator for the ABA Section of Urban, State and Local Government, who will discuss municipal anti-trust liability and introduce 42 U.S.C. §1983. Steven G. Farber, Esq., will deal with sovereign immunilty and Elizabeth E. Simpson, Esq., of Luebben, Hughes, Tomita and Borg will discuss what damages are recoverable in 1983 cases. Litigation strategies for the Section 1983 case will be examined by Richard Rosenstock, Esq., Phil Krehbiel, Esq., Keleher and McLeod, P.A. and Kathleen Davison Lebeck, Esq., Civerolo, Hansen and Wolf, P.A.

Advance registration for the two day seminar is $47.50 for non-attorney law office personnel, $85 for Public Advocacy Section members of the State Bar, $95 for attorneys and other professionals. The fee is waived for all federal, state and municipal judges. All registrations are $10 more at the door and accepted on a space available basis. Those registering at the door cannot be guaranteed course materials.

For more information, write or call: Continuing Legal Education, State Bar of New Mexico, P. O. Box 25883, Albuquerque, NM 87125. Telephone: 842-6132 in Albuquerque; Toll-Free: 1-800-432-6976 in-state. □

Disciplinary Note

(continued from page 2)

the discretion of the Court (although the ADA would agree not to oppose a sentence involving probation.)

The attorney returned to the jail to discuss the offer with his client. While he and the client were discussing the matter, the ADA appeared at the jail with the two arresting officers. The attorney and the client were then advised that the proposed plea agreement would be conditioned upon the client's agreeing to

(continued on page 5)

Disciplinary Note

(continued from page 4)

make a $2500 contribution to a contingency fund, which was utilized by local police officers to finance undercover drug purchases. The attorney inquired whether the ADA was suggesting that the agreement would contain a stipulation to a probationary period with the payment of the $2500 a condition of the probation and a matter of record with the Court, in which case the offer might be considered. The ADA indicated that he would not agree to this, and the plea offer was refused by the client. The ADA then proceeded to offer a grant of complete immunity to the co-defendants in exchange for their testimony against the attorney's client and to strenuously oppose the attorney's motion for bond reduction.

When questioned about this conduct, the attorney produced evidence from local judges, the former district attorney, and even local defense attorneys to show that this was common practice in that particular district. The current district attorney denied knowledge of the practice and directed that any such practice be discontinued, although others contended that the practice had been openly utilized in narcotics cases during the current district attorney's tenure. The feeling was that the practice was preferable to the previous practice whereby plea agreements in narcotics cases were conditioned upon the defendant's having to serve the police in an undercover capacity, a practice which had apparently resulted in the untimely demise of several persons who availed themselves of the opportunity. Those people unable to afford a monetary contibution were allowed to contribute a certain amount of time to community service. In most other cases, however, the plea agreement had included a probationary sentence. (The ADA in question stated that it was his belief that so long as he did not oppose probation, the Court would be obligated to impose a probationary sentence, a position not generally supported by statutory or case law.)

Despite the arguably humane purpose behind this system, the conduct in this case was clearly prejudicial to justice in violation of Disciplinary Rule 1-102 (A) (5). Justice does not contemplate the purchase of leniency nor does it contemplate a scheme whereby disparate treatment is given to persons based upon their financial means. The solicitation of a "contribution" in exchange for a plea borders upon extortion and would thus be violative of Disciplinary Rule 7-102 (A) (8). While there was no clear evidence that the ADA's actions after the plea was refused were taken out of spite or in retribution thus in a manner which would violate Disciplinary Rule 7-102 (A) (1), they could easily have been so construed by the defendant. Prosecuting attorneys have an obligation to behave in a manner consistent with fairness and avoid taking actions which might appear vindictive, if respect for the legal system is to be maintained.

Disciplinary counsel was inclined to file formal charges in this case but referred the file to two (2) hearing officers for second opinions. Both reviewing officers agreed that the ADA's conduct was highly improper and violative of the Disciplinary Rule noted above. They also felt, however, that it would be unfair to single out the ADA for harsh treatment when he was following what he believed to be (and what evidently had been) a generally acceptable procedure in his district. While the conduct of others did not excuse the conduct of the ADA, it was viewed as a factor in mitigation. Both reviewing officers recommended that the ADA be offered an informal admonition pursuant to Rule 8(b) (3) (iii) of the Rules Governing Discipline and Rule 9 of the Disciplinary Rules of Procedure. The ADA accepted the admonition.

It was also recommended that this case be the subject of a Disciplinary Note to put others on notice that this type of conduct is highly unethical. Any future complaints or reports of such behavior by prosecuting attorneys in criminal cases will be carefully scrutinized and, if supported by competent evidence, the subject of formal disciplinary proceedings.

It should be stressed that the misconduct in this case was the solicitation of money as a precondition to a plea agreement. Agreements which specify a probationary period, include a stipulation that a sum of

(continued on page 6)

Disciplinary Note

(continued from page 5)

money shall be paid to a particular organization (or to the victim or to the Court as a fine) as a condition of probation, and are subject to disclosure to and approval by the Court are an entirely different matter. In such cases, the Court would have the opportunity to insure that the proposed arrangement was acceptable and in keeping with the law and the fair administration of justice. No such judicial scrutiny was provided for in the instant case, however, nor was the proposed payment a condition of any probation. □

New Challenges To FIS Act

New challenges are being raised in U.S. district courts to the Foreign Intelligence Surveillance Act, and "the law is sure to be tested further," predict two lawyers with the U.S. Department of Justice in the current issue of *Judges' Journal* magazine.

The act permits electronic surveillance of foreign powers and their agents within the U.S., and creates the U.S. Foreign Intelligence Surveillance Court to review applications from the U.S. Department of Justice for orders allowing such surveillance in specific cases.

"One controversy that has arisen regarding the FISA Court is the fact that in the six years FISA has been implemented not one application has been turned down," says the authors, Allan N. Kornblum and Lubomyr M. Jachnycky. Kornblum is deputy counsel for intelligence operations and Jachnycky is an attorney-advisor, both of them working for the Office of Intelligence, Policy and Review.

The controvery has been examined in Congress, the authors noted. A House Permanent Select Committee on Intelligence concluded in 1982 that "the government's record in this area is generally reflective not of a rubber stamp court but of applications which have been carefully prepared and rigorously reviewed so as to insure compliance with act." However, challenges to the act have been lodged by foreign persons accused of spying in the U.S., U.S. citizens accused of being agents for foreign governments and persons accused of engaging in international terrorism.

Applications for electronic surveillance authorization require certification by a designated cabinet level official that the information sought constitues foreign intelligence and the purpose of the surveillance is to collect foreign intelligence information. The court can only question the representations in the certification when the target is either a U.S. citizen or a resident alien of the U.S., and the judge finds the certification to be clearly erroneous. Challenges to the act arise when an accused person challenges the validity of the order authorizing the surveillance. Under the statute, the legality of the statute can only be determined by district court judges, and if the U.S. attorney general claims the information supporting the certification is privileged the district judges must review the material in camera, or in secrecy. The judges can only disclose those documents if necessary "to make an accurate determination of the legality of the surveillance."

District courts have been reviewing sealed exhibits from the FISA court for four years, and have never disclosed to the defense any portion of the government's applications or orders. The act does require the government to notify an individual that it intends to use information gleaned from surveillance against that person, and provides that the individual could obtain copies of relevant tape recordings and transcripts, but not have access to surveillance applications or orders.

Kornblum and Jachnycky review challenges to convictions under the statute based on the composition of the court (seven district court judges appointed for staggered seven year terms), distinctions between political and factual rulings, Fourth Amendment claims, Fifth Amendment claims, intelligence purposes and the conduct of surveillance. None have succeeded.

Judges' Journal is published quarterly by the American Bar Association Judicial Administration Division for its judicial members in administrative, trial and appellate courts of special and general jurisdiction and for lawyer members of the division. □